

1 DIVISION OF LABOR STANDARDS ENFORCEMENT  
Department of Industrial Relations  
2 State of California  
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5 Attorney for the Labor Commissioner  
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7

8 BEFORE THE LABOR COMMISSIONER  
9 OF THE STATE OF CALIFORNIA  
10

11 SHAWN ASSELIN,	)	No. TAC 14-97
	)	
12 Petitioner,	)	
	)	
13 vs.	)	
	)	
14 ANDY ANDERSON, an individual	)	DETERMINATION OF CONTROVERSY
dba ANDY ANDERSON AGENCY,	)	
	)	
15 Respondent.	)	
	)	

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17 INTRODUCTION

18 The above-captioned petition was filed by Shawn Asselin  
19 (hereinafter "petitioner") on March 25, 1997, seeking  
20 reimbursement of the \$350 that Andy Anderson, an individual dba  
21 The Andy Anderson Agency (hereinafter "respondent") had allegedly  
22 charged the petitioner for photographs. Respondent was  
23 personally served with a copy of the petition on April 28, 1997  
24 and filed an answer to the petition on May 9, 1997, denying that  
25 he sold any photographs to the petitioner.

26 A hearing was scheduled before the undersigned attorney,  
27 specially designated by the Labor Commissioner to hear this  
28 matter, and the hearing commenced as scheduled on August 6, 1997,

1 in San Diego, California. Both the petitioner and the respondent  
2 appeared in propria persona.

3 Based upon the testimony and evidence received at this  
4 hearing, the Labor Commissioner adopts the following determination  
5 of controversy.

6 FINDINGS OF FACT

7 Petitioner first came into contact with the Respondent  
8 in September 1996, after seeing an advertisement respondent had  
9 placed in a local newspaper for modeling opportunities.  
10 Petitioner visited respondent's office for an audition, and  
11 brought samples of photographs from a recent photo shoot.  
12 Respondent told petitioner that he had "passed the audition", and  
13 that he was "willing to represent [petitioner] as a talent agent",  
14 but that first, petitioner needed to obtain "better photos."  
15 Respondent advised the petitioner that he could get photographs  
16 from any photographer, but recommended the services of Karen  
17 Martin "because she knows exactly what I need for my agency."  
18 Respondent did not give the petitioner the names of any other  
19 photographers. Petitioner decided to use Karen Martin's services,  
20 deciding that using another photographer would pose a risk of  
21 Respondent's rejection of another set of photographs.

22 The respondent never provided the petitioner with Karen  
23 Martin's address or telephone number; instead, the petitioner was  
24 told that he could meet Karen Martin at a later date in  
25 Respondent's office. The Respondent informed petitioner that the  
26 photo shoot and prints would cost \$340 total, of which \$100 in  
27 cash would have to be paid to the Respondent as an advance  
28 deposit. Respondent then gave \$100 in cash to the respondent as a

1 deposit. Shortly thereafter, petitioner returned to Respondent's  
2 office to deliver a check for the \$240 balance. The check was  
3 made out to Karen Martin. According to the petitioner, he gave  
4 this check to the Respondent, who then transmitted it to Ms.  
5 Martin. According to the respondent, the petitioner gave this  
6 check to Ms. Martin directly.<sup>1</sup>

7           The check was subsequently cashed by Ms. Martin, but on  
8 the reverse side of the check, Ms. Martin listed her address as  
9 7801 Mission Center Court, San Diego - - the business address of  
10 the Respondent. According to Respondent, Ms. Martin does not have  
11 a separate office address, and she does not have her own  
12 photography studio, but instead uses his agency as a "mailing  
13 station" and that she shows up at his agency about once a day to  
14 pick up money and checks and to set up photo shoots. Respondent  
15 testified that Ms. Martin has no prior experience as a  
16 professional photographer and that he set Ms. Martin up in the  
17 photography business, by introducing her to a photographer named  
18 Manuel, and suggesting that she ask Manuel if he would be willing

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19  
20           <sup>1</sup> In general, we find the petitioner to be a far more credible witness than the respondent,  
21 and faced with these two conflicting accounts of this transaction, we credit petitioner's testimony  
22 over that of the respondent. For one thing, the testimony of four other witnesses - - Sandra  
23 Tillman, Hadas Tepman, Karen Oyanguren and Danny Morris - - all of whom are actors or models  
24 who sought representation from the respondent, establishes that the respondent engaged in a  
25 pattern and practice of referring artists to Karen Martin for photographic services, that respondent  
26 himself informs the artists of the amount they must pay for the photographs, that respondent always  
27 advises the artists that a portion of this amount must be paid in cash as a deposit and the balance  
28 paid by check, and that respondent himself collects the cash and checks from the artists in payment  
for these photographs. In some instances, the checks are made out to Karen Martin; in other  
instances they are made out to Andy Anderson, but in all instances, the checks (and cash) are  
collected by Anderson. This is consistent with petitioner's testimony. Moreover, respondent's  
testimony that he "did not know that an agent can't collect money for photographs" if the agent has  
no financial interest in the photography business is patently false, in that respondent was told  
exactly that in a Determination served on the respondent on August 11, 1995 in a matter entitled  
Rezin v. Anderson ( No. TAC 7-94). Respondent's obvious lie concerning his knowledge of the  
Talent Agency Act's requirements compels us to view the truthfulness of other areas of his  
testimony as suspect.

1 to work for her. Manuel agreed to work for Ms. Martin, so she  
2 uses his services as a photographer and then has the photos  
3 printed by a processing lab in Los Angeles. Respondent testified  
4 that he tries to help Ms. Martin by "throw[ing] as much business  
5 as [he] can" to her. However, Respondent testified that he  
6 doesn't have any financial interest in Ms. Martin's photography  
7 business, and that although he collects cash or checks on Ms.  
8 Martin's behalf, he doesn't keep any of this money and does not  
9 make any money from these photographs.

10           Petitioner had his photographs taken three weeks after  
11 he paid for the photos. Petitioner signed a printed statement on  
12 September 24, 1996, that had been prepared and provided to him by  
13 Respondent. This statement asserts that "this Agency did not sell  
14 you any pictures or accept any money for fees." Petitioner  
15 testified that when he signed this, he knew it was false but that  
16 he had believed that his signature was needed in order to obtain  
17 Respondent's services as a talent agent. The statement also  
18 provides that "[w]e agree to represent you in the field of T.V.  
19 commercials and or modeling. . . .we are a talent agency and  
20 operate on a 10% commission basis."

21           Respondent never obtained any work for petitioner. In  
22 petitioner's view, the reason for this is that Respondent failed  
23 to make any attempts to procure employment on his behalf, as  
24 evidenced by the fact that he never got called to any auditions or  
25 "go sees". Respondent testified that he didn't have a sufficient  
26 opportunity to try to obtain work for the petitioner, as a result  
27 of petitioner's failure to return a completed personal information  
28 card until November 12, 1996, which respondent asserts he needed

1 before he could start representing petitioner. Six weeks later,  
2 on December 26, 1996, petitioner advised respondent that on  
3 November 19, 1996 he had joined the Screen Actors Guild ("SAG") in  
4 order to qualify for work which required SAG membership.  
5 Respondent rebuked the petitioner for having joined SAG without  
6 consulting him, as this essentially prohibited respondent from  
7 providing further representation to the petitioner, in that  
8 Respondent is not a SAG franchised agent, and thus, under SAG  
9 rules, cannot represent a SAG member. But respondent failed to  
10 present any evidence that he had ever warned petitioner, prior to  
11 December 26, 1996, of the fact that he was not authorized to  
12 represent SAG members. Respondent should have warned petitioner  
13 of this at the inception of his representation, precisely to avoid  
14 this sort of problem, and to allow petitioner to make an informed  
15 choice as to whether to engage the services of a non-franchised  
16 agent. We therefore find that petitioner is not to blame for  
17 respondent's ultimate inability to procure employment for the  
18 petitioner.

19 After being informed that as a SAG member, he could no  
20 longer be represented by respondent, Petitioner demanded that  
21 Respondent reimburse him for the \$340 he had spent for the  
22 photographs. Respondent refused and this petition followed.

#### 23 CONCLUSIONS OF LAW

24 1. Respondent is a "talent agency" within the meaning  
25 of Labor Code section 1700.44(a). Petitioner is an "artist"  
26 within the meaning of Labor Code section 1700.4(b). The Labor  
27 Commissioner has jurisdiction to determine this controversy  
28 pursuant to Labor Code section 1700.44(a).

1           2. Labor Code section 1700.40 provides that "no talent  
2 agency shall collect a registration fee." The term "registration  
3 fee" is defined at Labor Code section 1700.2(b) as "any charge  
4 made, or attempted to be made, to an artist for . . . photographs,  
5 film strips, video tapes, or other reproductions of the applicant  
6 [or] . . . any activity of a like nature." It is well  
7 established, pursuant to section 1700.40, that a talent agency  
8 cannot charge an artist for a photo shoot or for the printing of  
9 photographs. To quote from the Labor Commissioner's Determination  
10 that issued on August 10, 1995 in Valerie Rezin v. Andy Anderson  
11 (No. TAC 7-94), "Such charges are unlawful irrespective of whether  
12 the agent profits from these charges. The statute is violated  
13 anytime an agent collects such fees from an artist, even if the  
14 agent transmits the entire fee to another person without retaining  
15 any portion as a profit, and even if the agent is not yet  
16 representing the artist at the time the fees are collected." The  
17 purpose of this statute was to create a firewall between agents  
18 and photographers, and to prevent agents from running "photo mill"  
19 operations using ostensibly "independent" photographers, who are,  
20 in reality, dependent on the agent for their economic livelihood.  
21 Whether or not Respondent has a financial interest in Karen  
22 Martin's photography business (and we find it almost  
23 inconceivable that he does not, in view of the extent to which her  
24 business is tied to his office, and in view of the fact that a  
25 significant portion of the payments which he collects are on a  
26 cash basis), the fact is that merely by collecting cash or checks  
27 on behalf of this photography business, Respondent violated Labor  
28 Code section 1700.40.

1           3. We therefore conclude that petitioner is entitled to  
2 reimbursement of the \$340 that he gave to Respondent for  
3 photographs, with interest at 10% per annum from September 15,  
4 1997, the approximate date that said amount was unlawfully  
5 collected by the Respondent, in accordance with the provisions  
6 Civil Code sections 3287 and 3289.

7           4. Labor Code section 1700.40 further provides that a  
8 talent agency that fails to reimburse an artist within 48 hours of  
9 the artist's demand for reimbursement of any fees that were paid  
10 to the agency for the procurement of employment must pay the  
11 artist a penalty equal to the amount of the improperly withheld  
12 fee if the artist did not procure, or was not paid for, the  
13 employment for which the fee was paid. Here, petitioner paid the  
14 fees for the photo shoot and photographs in order to have the  
15 Respondent procure employment. Respondent failed to reimburse  
16 these fees to petitioner within 48 hours of her demand therefor,  
17 and never procured any acting or modeling employment for  
18 petitioner. As noted above, we find that petitioner is not to  
19 blame for any inability on the part of the respondent to procure  
20 employment on petitioner's behalf. Consequently, we find that it  
21 would be appropriate to award penalties pursuant to section  
22 1700.40. We therefore conclude that petitioner is entitled to  
23 \$340 in penalties.

24                               ORDER

25           For the above-stated reasons, IT IS HEREBY ORDERED that  
26 Respondent ANDY ANDERSON, an individual dba THE ANDY ANDERSON  
27 AGENCY pay petitioner SHAWN ASSELIN \$340 for unlawfully collected  
28 fees, \$31.45 for interest on these fees, and \$340 in penalties

1 under Labor Code section 1700.40, for a total of \$711.45.

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Dated:

8/19/97



MILES E. LOCKER

Attorney for the Labor Commissioner

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ADOPTED AS THE DETERMINATION OF THE LABOR COMMISSIONER:

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Dated:

8/22/97



JOSE MILLAN

State Labor Commissioner

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STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS - DIVISION OF LABOR STANDARDS ENFORCEMENT

CERTIFICATION OF SERVICE BY MAIL  
(C.C.P. §1013a)

(SHAWN ASSELIN v. ANDY ANDERSON AGENCY)  
(TAC 14-97)

I, MARY ANN E. GALAPON, do hereby certify that I am employed in the county of San Francisco, over 18 years of age, not a party to the within action, and that I am employed at and my business address is 45 Fremont St., Suite 3220, San Francisco, CA 94105.

On August 25, 1997, I served the following document:

DETERMINATION OF CONTROVERSY

by placing a true copy thereof in envelope addressed as follows:

SHAWN ASSELIN  
6736 Fisk Avenue  
San Diego, CA 92122

ANDY ANDERSON  
Andy Anderson Agency  
7801 Mission Center Ct., 2nd Floor  
San Diego, CA 92108

and then sealing the envelope with postage thereon fully prepaid, depositing it in the United States mail in the city and county of San Francisco by ordinary first class mail.

I certify under penalty of perjury that the foregoing is true and correct. Executed on August 25, 1997, at San Francisco, California.

  
MARY ANN E. GALAPON

CERTIFICATE OF SERVICE BY MAIL